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STATEMENT OF EDWARD J. LUI
RELATING TO AMENDMENTS TO CHAPTER 37 AND 37-A
PUBLIC HEALTH REGULATIONS, PRESENTED TO THE DEPARTMENT OF HEALTH,
STATE OF HAWAII

Honolulu, Hawaii

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My name is Edward J. Lui. I am Director of Environmental Affairs for the Hawaiian Sugar Planters' Association. This statement is being made on behalf of the Association and its member companies.

The Department of Health is proposing to substantially modify the requirements relating to water pollution control and the water quality standards by amending Chapters 37 and 37-A of the Public Health Regulations. We recognize this as a step towards the State's assumption of authority to issue permits under the National Pollutant Discharge Elimination System established by Public Law 92-500. In this respect, the intent of these proposals before this hearing today is endorsed by the sugar companies of Hawaii. We applaud the State's intent to assume responsibilities for the issuance of discharge permits.

We have many reservations concerning these proposals and would like to present a detailed description of these reservations to this hearing panel. However, in fairness to the panel and to others waiting to testify, I am requesting that we be given the opportunity to submit additional detailed comments to you in writing at a later date but before the hearing record is closed.

Comments Relating to Chapter 37

Our comments on the amendments to Chapter 37 principally relate to their inconsistencies with Chapter 342 of the Hawaii Revised Statutes on Environmental Quality. All State regulations established for pollution control must be established pursuant to this law. However, in trying to adapt the State regulations to conform to Federal requirements, we feel that errors have been committed and that some of the requirements of the State law have been overlooked. Examples of these inconsistencies included in our statement reflect the extent of the conflict and certainly do not reveal all of the inconsistencies.

Our specific comments are as follows:

(1) Definition of "Water Pollution"; page 1

This definition is taken from Chapter 342, HRS. However, it appears that an error in form has been made in the copying of this statute. The phrase "as will or is likely to create a nuisance or render such waters unreasonably harmful, detrimental or injurious to public health, safety or welfare, including harm, detriment or injury to public water supplies, fish and aquatic life and wildlife, recreational purposes and agricultural, industrial, research and scientific uses of such waters" should start at the left margin as part of sub-section (a) to modify both paragraphs (1) and (2) of section 1(a), as written in Act 100, 1972 Session Laws. This change, would make the definition of the term "water pollution" conform with that intended by Act 100.

(2) Definition of "State Waters"; page 3

The definition, as proposed in section 1(d) does not conform to the definition of "State Waters" in Chapter 342, HRS. An important phrase has been excluded from the proposal which would result in a significant departure from the definition authorized by the statute. The phrase "provided that drainage ditches, ponds, and reservoirs required as part of a pollution control system are excluded" has been left out of the proposed amendment. Clearly, the proposed definition of State Waters for Chapter 37 goes beyond the bounds established by Chapter 342, HRS.

Consistency of this definition with the statute should be established.

In addition to the above changes, we feel that ditches, ponds and reservoirs included as part of an irrigation system ought to be excluded from the definition of State Waters. These systems are privately owned and are not subject to the uses prescribed for public waters. Furthermore it would be unreasonable to impose the same requirements normally made on public recreational waters to private waters used for irrigation purposes only.

(3) Definition of "pollution"; page 6

In section 1(s) the adoption of the Federal definition of "pollution", as defined in section 502, PL92-500, into the State regulations is intended. We question whether or not this is proper in view of the definition of the same term in Chapter 342, HRS. It seems to us that since these are State regulations, established under State law, the State's definition should prevail.

(4) Definition of "minor discharge"; page 7

We have difficulty with what is meant by "total volume of less than 50,000 gallons on every day of the year" in section 1(w). Does this mean a discharge which will, at no time, exceed 50,000 gallons per day? If so, then why doesn't it say that? It seems to us so much simpler to say "has a total volume of not more than 50,000 gallons per day on any day of the year." The same could be said for section 6(e) on page 17 of the draft.

(5) Filing fees; page 12

Section 3(e) establishes filing fees for applicants for NPDES permits. We note that paragraph (2) and (3) appear to be inconsistent with section 17 of the proposed regulations. While section 3(e) implies that transfer of a NPDES permit from one person to another and from one location to another, is allowed, section 17 prohibits such transfers. We think that it is reasonable for conditional transfers to be allowed and request that section 17 be amended to reflect this.

(6) General prohibition; page 14

The second paragraph of this section appears to contain a drafting error. We assume that this section is a verbatim copy of section 342-33, HRS. If so, the word "system" following "drainage" should be deleted.

(7) Conditions for issuance of NPDES permit; page 33, 34

Chapter 342, HRS, requires that the Director determines that the issuance of a permit be in the public interest. Furthermore, in determining the public interest, the Director shall consider the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided and other

factors as stated in section 342-6, HRS. These requirements are not reflected in the proposed regulations. We recommend that section 15 be appropriately amended to be consistent with State law.

The first condition for approval of a NPDES permit requires the application of the best practicable control technology for the reduction of pollutant discharges. It seems to us that section 15(a)(1) goes beyond this requirement by the addition of the phrase "so as to eliminate or reduce wastes to a minimum." Addition of this phrase would appear to alter the definition of "best practicable control technology" such that it extends beyond whatever guidelines were promulgated to reflect this technology. We suggest that something on the order of "the existing treatment works or waste outlet is designed, built, and equipped such that the discharge reflects the application of the best practicable control technology for the removal of pollutants" be used instead.

(8) Transfer of NPDES permits; page 38

Section 17 prohibits the transfer of permits. We think that this is too restrictive and somewhat contrary to the implications of the fee schedule. The language regarding the nontransferability of permits from one piece of equipment to another is confusing and misleading. To what extent does this apply? What is meant by a piece of equipment? The prohibition should apply only to the transfer of a permit from one discharge to another, all other transfers being allowable.

(9) Compliance schedules; page 42

Section 21(a) refers to section 19(d) and (e). Where are these sections? They are not contained in our copy of the draft as obtained from the Department.

(10) Monitoring requirements; page 54

The proposed regulations require that all discharges with three exceptions shall be monitored by the permitee for flow and pollutant content. We expect that some of our intermittent and irrigation tailwater discharges will not fall under these exceptions. Furthermore, we think it would be unreasonable for the Director to require such monitoring of these discharges whose occurance and location are more often than not discovered after the fact. We request that section 26 be amended such that the minimum monitoring requirements would not apply to accidental discharge of irrigation tailwater.

(11) Exclusions

We request that exclusions, applicable to Hawaii, from permit requirements as contained in subsection 125.4 of Part 40, Code of Federal Regulations, be included in these amendments. The rationale for excluding certain types of discharges was made abundantly clear during the review of federal regulations relating to the National Pollutant Discharge Elimination System.

Comments Relating to Chapter 37-A

We note that certain provisions of Chapter 37-A, Water Quality Standards, are proposed to be substantially amended. In general it appears that the water quality standards themselves are not to be significantly amended, although the body of evidence showing them to be invalid continues to grow while we are subject

to unreasonable requirements born of these invalid standards. Our specific comments are as follows:

(1) Reference to Chapter 45, PHR; page 1

This appears to be in error and should be corrected.

(2) Classification of Class B waters; page 4

The stated objective for this class of waters is that discharges of any pollutant be controlled to the maximum degree possible. The implication is that the best avaiable control technology ought to be applied. This somehow seems incompatible with the use of these waters. We suggest that the word "practicable" should replace the word "possible." As drafted, the objective for Class B waters is not consistent with its definition.

(3) Classification of Oahu water areas as Class AA; page 8

We object to the classfication of West Loch as Class AA. The present state of West Loch makes it unsuitable for the uses intended for Class AA waters and there is evidence to suggest that the standards for this classification will never be achieved there. Circulation in this bay is poor at best and its principle opportunity for flushing is the inflow of water from nonmarine sources. We request that West Loch be changed to Class A.

(4) Classification of Lanai water areas; page 12

We raise this question for informational purposes only. Outside of Manele Bay, Manele Harbor and Kaumalapau Harbor what is the classification of the waters around Lanai? It certainly is not clear in the proposed regulations.

(5) Classification of Maui waters in Class A; page 13

Section 5(A) (6) (b) states that all coastal waters and non-tidal brackish and saline waters not included in any other class are to be Class A. We are concerned that the proposed classification now includes Kealia and Kanaha ponds on Maui in Class A waters. Both of these ponds receive discharges of irrigation water from the Hawaiian Commerical and Sugar Company. It has been shown that periodic discharges of water into these ponds is necessary to keep them from drying up and thus eliminating the unique eco-systems in the brackish areas. For the record, discharges into Kanaha pond are made at the request of the State's Division of Fish and Game. We think these two ponds ought to be excluded from any classification.

(6) Classification of freshwater areas; page 15

Under the proposed classification system, all freshwater areas will be either Class 1 or Class 2. We strongly oppose such a classification. There is no way that adequate control over water quality can be maintained such that the waters contained in our irrigation system will conform to the requirements of Class 2. In addition, it will no longer be feasible for private irrigation systems to absorb discharges of sewage effluent as a means of disposal of municipal wastewater. Finally, these privately owned and managed water systems are contained and used within company property. The State has no business regulating the quality of waters used for irrigating sugarcane unless it is demonstrated to be harmful to the public interest for these waters to exceed the water quality standards. Waters used for irrigation purposes and those which are contained in pollution control systems should be excluded from the fresh water standards.

(7) Basic water quality standards; page 16, 17, 18

Proposed amendements to section 6(A)(3) prohibits substances in amounts sufficient to change the existing color, turbidity or other conditions in the receiving waters. It seems to us that any discharge not identical to the receiving waters in every way will impart a change to the receiving water. Such a standard would only allow receiving water to be discharged into itself and is unreasonably stringent. What use are the specific standards with a basic standard such as this which no discharge could possibly meet? We suggest inclusion of the word "substantially" such that the phrase would read "...or in amounts sufficient to substantially change the existing color,..."

The fourth standard, section 6(A)(4) limits the amount of "high temperature" to amounts less than that sufficient to interfere with any beneficial use of the water. We believe that the correct terminology is "heat" rather than "high temperature."

The use of the 96-hour bioassay as proposed is highly suspect as a valid criterion. There are too many variables involved in the survival of marine organisms to give significance to a test designed for fresh water systems. The conditions of the test can create situations which would never occur in the open ocean. We question its use in establishing compliance with the water quality standard.

Section 6(a)(5) requires that all waters shall be free of soil particles resulting from erosion unless it can be shown that the land is being managed in accordance with soil conservation practices acceptable to the Director. Although the Director is charged with the authority to enforce these regulations,

we do not believe that he should be the one to make the determination of proper soil conservation practices. The most appropriate agency to make such a determination is the Soil Conservation Service, who specializes in this area.

(8) Specific standards pH; page 20, 21

The standards for Class AA appears to us to be unrealistic and does not take the pH of naturally occurring seawater into account. To illustrate, the pH of normal, unaltered seawater has a range of 8.0 to 8.3. If a deviation of one-half unit from the natural state is allowed, then it stands to reason that the lowest allowable value ought to be 7.5 and the highest 8.8. We suggest that the limit for Class AA reflect this computation.

Similarly, the allowable high value for Class A, B, 1 and 2 ought to be at least 8.8.

(9) Specific standards nutrients; page 21

We question the values shown in the proposed amendments. There is sufficient evidence to indicate that most of these values are commonly exceeded in naturally unaltered waters within the State. The standards should reflect allowable changes from the natural state rather than be in terms of specific, inflexible values which cannot account for normal variation.

(10) Zones of Mixing; page 25

The amendments to Section 7 now establish the zone of mixing as a variance from the standards. We do not believe that this should be the case. The zone of mixing, as originally intended, was a separate classification of State waters to be established at the discretion of the Director under such conditions as he may require. We feel that this ought to be restored. The zone of mixing is not a variance

as defined under Chapter 342, HRS, but a separate and distinct classification of water to be used for the assimilation of municipal, agricultural and industrial discharges.

(11) Zone of mixing requirements; page 28

Section 7(f) (3) requires that every zone of mixing include, as a minimum, effluent and receiving water monitoring, and a program of research to develop practicable alternatives to the pesent methods of treatment or control. Frankly, we don't understand this requirement. If the application of best practicable treatment or control is required for a zone of mixing as proposed in section 7(e) (4) why then is there a requirement that research be done to seek an alternative to what is already best practicable treatment? We suspect that this requirement pertains to zones of mixing granted under section 7(f) (1); however, this is not the way the amendment is drafted. In one case the requirement is superfluous and not needed and in the other, a reorganization is needed.

(12) Zone of mixing duration; page 28

The proposed maximum duration for a zone of mixing is five years. We think that this is too short. Chapter 342, HRS, allows a maximum of 10 years for variances. If a zone of mixing is to be a variance (with which we disagree), this ought to be included in the proposed regulation. For accidental discharges of irrigation tailwater in particular, the maximum 5 year duration will result in wasted effort - on the part of both the State and the sugar companies.

(13) Zone of mixing - EPA approval; page 29

The provisions of section 7(j) should be deleted in their entirety. We do not believe that it is within the purview of the EPA to exercise such authority over the granting of zones of mixing. This is a state responsibility authorized by state law. The federal statute nowhere authorizes the EPA to grant such approvals or make such denials.

General Comments

Substantial changes are proposed for both Chapter 37 and 37A. Chapter 37 has been completely rewitten to incorporate some of the procedures presently contained in EPA regulations. There seems to have been some difficulty in merging the Federal and State requirement such that Chapter 37 could be the comprehensive document needed for State administration of the NPDES permit system. After careful review, we have concluded that Chapter 37, as proposed, is not clearly written and confusing. The relationship among its various provisions is difficult to understand.

We realize that amendments to Chapter 37 and 37A are necessary for the State to obtain authority to issue NPDES permits. However, we do not believe that the need is so pressing as to force the adoption of confusing regulations. We urge the Department of Health to review the proposed regulations for the express purpose of improving the draft before this hearing today. Many changes need to be made. It will be a difficult job but it will be far better to take the time to formulate good regulations than to adopt unenforceable and unreasonable ones just for the sake of expedience.

Thank you for this opportunity to testify. This concludes my statement.